

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: JUMA, C.J., MWARIJA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 22 OF 2017

EVANCE JOSEPH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mtwara)

(H. S. Mushi, SRM) (Ext. Jur.)

dated the 30th day of September, 2016

in

Criminal Appeal No. 11 of 2016

JUDGMENT OF THE COURT

22nd & 28th February, 2019

MWARIJA, J.A.

In the Resident Magistrate's Court of Mtwara, the appellant, Evance Joseph was charged with two counts. In the first count he was charged with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code. It was alleged that on unknown date and time in 2015 at Mkunguni area within Masasi District in Mtwara region, the appellant raped one R.H., a school girl aged 16 years.

In the 2nd count, which was in the alternative to the first count, he was charged with impregnating a school girl contrary to [rules] 5 and 6 of Imposition of Penalties to Persons who marry or impregnates a school girl, made under the Education Act No. 25 of 1978 and Published in Government Notice No. 265 of 2004. It was alleged that on unknown date and time in 2015 at Mkunguni area within Masasi district in Mtwara region, the appellant impregnated the said "R.H" a girl aged 16 years who was schooling at Nangaya Secondary School.

When the rape charge was read over to him, the appellant pleaded guilty. The trial court proceeded to read over the alternative count to which the appellant also pleaded guilty. Following his admission of the facts, in respect of the two counts, the trial court found him guilty. He was however, convicted of the 1st count and consequently sentenced to the statutory minimum term of imprisonment of thirty (30) years.

Aggrieved by convictions and sentence, the appellant appealed to the High Court. According to the record of appeal, the appeal was transferred to the Resident Magistrate's Court of Mtwara to be heard by a resident magistrate with extended jurisdiction (Ext. Jur.). In the proceedings dated

17/6/2016 presided over by H.S. Mushi, SRM (Ext. Jur.), the learned Senior Resident Magistrate observed as follows:-

*"Court: Upon this appeal transferred to me by the
Hon. J i/c let, the following orders be issued...."*

The learned appellate magistrate then proceeded to hear the appeal and in his judgment dated 30/9/2016 he dismissed it for lack of merit. The appellant was further aggrieved by the decision of the Senior Resident Magistrate (Ext. Jur.) hence this second appeal.

At the hearing of the appeal, the appellant was represented by Mr. Reinery Songea, learned counsel while the respondent Republic was represented by Mr. Abdulrahman Mohamed, learned Senior State Attorney.

Before the appeal could proceed to hearing, Mr. Songea sought and obtained the leave of the Court to argue a point of law concerning the jurisdiction of the Resident Magistrates Court in entertaining the appeal. The learned counsel submitted that the record does not show that the appeal was transferred by the High Court to be entertained by a resident magistrate with extended jurisdiction. He stressed that in the absence of a

transfer order, determination of the appeal by Mtwara Resident Magistrate's Court contravened the provisions of S. 45 (2) of the Magistrate's Courts Act, [Cap. 11 R.E. 2002]. Citing the Court's decisions including the cases of **Fedelis Mlelwa and Another v. The Republic**, Criminal Appeal No. 248 of 2015 and **Erney Gaspar Asenga v. The Republic**, Criminal Appeal No. 238 of 2007 (both unreported), the learned counsel argued that, in the absence of a formal order transferring the appeal, the learned Senior Resident Magistrate (Ext. Jur.) lacked jurisdiction, the effect of which the proceedings were a nullity. He urged us to nullify the proceedings and set aside the judgment.

In reply, Mr. Mohamed conceded to the point raised by the respondent's counsel. He stated that, his perusal of the record revealed that there was no order of the High Court which transferred the appeal to the Resident Magistrate's Court of Mtwara. Relying on the case of **Gaspar Asenga** (supra) cited by Mr. Songea, the learned Senior State Attorney argued that the defect rendered the proceedings in the Resident Magistrates Court a nullity. He urged us to nullify the proceedings of the

SRM (Ext. Jur.) and order that the record, be returned to the High Court for the appeal to be heard afresh.

It is indeed a correct position that from the record, there is no order of the High Court transferring the appeal to the resident magistrate's Court. Under S. 45 (2) of the Magistrate's Courts Act [Cap. 11 R.E. 2002], an appeal filed in the High Court may be heard by a resident magistrate with extended jurisdiction if the High Court transfers such an appeal to that court. That provision states as follows:-

"45- (1)

(2) The High Court may direct that an appeal instituted in the High Court be transferred and be heard by a resident magistrate upon whom extended jurisdiction has been conferred by section 45 (1)."

It is imperative therefore, that a resident magistrate with extended jurisdiction cannot entertain an appeal filed in the High Court unless the appeal is formally transferred for that purpose.

Where like in the present case, there is no formal order transferring an appeal to a resident magistrate's court, the proceedings are rendered a nullity. In the case of **Robert Mneney v. The Republic**, Criminal Appeal No. 341 of 2015, cited by the respondent's counsel, for example, the appeal was heard by a resident magistrate. There was however no order of transfer issued by the High Court. Having considered the irregularity, the Court observed as follows:-

"In relation to whether or not the appeal was properly transferred to Hon. W.N.B. Kapaya, Principal Resident Magistrate, it is evident from the record that no formal order of transfer was made thereby offending section 45 (2) of the [Magistrate's Courts Act]. It then follows as night follows day that the proceedings and judgment before Hon. Kapaya were a nullity."

-See also the cases of **Fidelis Mlelwa and Another v. The Republic**, Criminal Appeal No. 248 of 2015 and **Erney Gaspar Asenga v. The Republic**, Criminal Appeal No. 238 of 2007 (supra) cited by the

respondent's counsel. In the latter case, the Court stated as follows on the appeal which was heard by a resident magistrate with extended jurisdiction without a formal order of transfer by the High Court:-

*"It is now settled law that in the absence of a formal order by the High Court transferring the appeal to a Resident Magistrate with extended jurisdiction, the proceedings before such a magistrate and the decision therefrom are equally a nullity. See for instance **CHILANGAZI KAJE and TWO OTHERS V. REPUBLIC**, Criminal Appeal No. 9 of 2000 and **HERIEL ADAM KIMARO and FOUR OTHERS V. REPUBLIC**, Criminal Appeal No. 237 of 2007 (both unreported)."*

On the basis of the above stated position of the law, we agree with both learned counsel for the parties that the proceedings before Mushi, SRM (Ext. Jur.) were a nullity for want of the order of the High Court transferring the appeal to Mtwara Resident Magistrate's Court. In the event, we hereby nullify the proceedings conducted by H.S. Mushi, SRM

(Ext. Jur.) and set aside the judgment. On the way forward, we order that the record be remitted to the High Court for the appeal to be heard afresh according to the law.

DATED at **MTWARA** this 27th day of February, 2019.

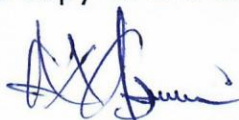
I. H. JUMA
CHIEF JUSTICE

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL